that court denying the intervenor-defendant's motion for summary judgment (Pet. App. 8a-10a) is reported at 255 F. Supp. 466. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-5a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1967. The petition for a writ of certiorari was filed on July 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In a representation election conducted by the National Mediation Board where two unions were competing for the right to represent a craft of 400 employees, a majority of the craft (221) voted in favor of having one or the other union as a collective bargaining representative and a minority (179) signified their desire to have no collective bargaining representative by failing to cast valid ballots for any representative. Of those voting in favor of collective bargaining representation, 147 voted for one union and 74 voted for the other. The Board certified the union receiving 147 votes. Under these circumstances,

1. Did the district court have jurisdiction in an action against the Board to set aside the certification on the ground that the certified union failed to receive the votes of a majority of the craft? and,

2. If the district court did not have jurisdiction to set aside the certification, could the court properly decline to enforce the certification on the same ground in an action by the certified union to compel the employer to bargain?

STATUTE INVOLVED

Section 2, Fourth, 45 U.S.C. 152, Fourth, of the Railway Labor Act provides:

> *Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.*
>
> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions

payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Section 2, Ninth, 45 U.S.C. 152, Ninth, of the Railway Labor Act provides:

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other

appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT

Petitioner, Aeronautical Radio, Inc., is an employer subject to the Railway Labor Act. In 1965, both the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "the Teamsters") and the Air Line Dispatchers Association, AFL-CIO (hereinafter "ALDA") sought to be certified as the collective bargaining representative of a 400-man craft of petitioner's employees (R. 40-41). After a hearing and findings by the National Mediation Board with respect to the appropriate craft lines (R. 41-42), the Board directed that a representation election be held (R. 11-13, 42). The ballots employed by the Board in the election contained a space to vote for the Teamsters, a space to vote for

ALDA, and a space in which the employees could write in the name of "Any Other Organization Or Individual" (R. 15). In addition, at the top of the ballot under the heading "Instructions For Voting," the employees were advised: "No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified" (R. 15).

A total of 221 employees voted for one or the other of the contesting unions and 179 employees failed to vote or cast void ballots (R. 17, 42).[2] Of the 221 voting for collective bargaining representation, 147 voted for the Teamsters and 74 voted for ALDA (R. 17, 42). Since a majority of the employees voted in favor of union representation and a majority of these voted for the Teamsters, the Board on October 25, 1965, certified the Teamsters as the duly designated and authorized representative of the craft (R. 16-17).

After the Board denied the petitioner's request to stay the issuance of any certification on the ground that certification of the Teamsters would be contrary to Section 2, Fourth, of the Act (R. 19-20, 25), petitioner filed a complaint in the district court against the Board, claiming that the certification was invalid (R. 3-10). The Teamsters intervened as a party, and filed a counter-claim and motion for summary

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[2] Under the Board's procedures, as indicated by the voting instructions to the employees contained on the ballots, failure to cast a ballot or casting a void ballot is treated as a vote against any collective bargaining representation. See, *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, 669-670.

judgment against petitioner, seeking, *inter alia*, an injunction restraining petitioner from refusing to bargain with the Teamsters as the certified representative (R. 55-56). The district court declined to invalidate the certification and dismissed petitioner's complaint for lack of jurisdiction (Pet. App. 6a). However, the court refused to enforce the certification and denied the Teamsters' motion for summary judgment enjoining petitioner from refusing to bargain (Pet. App. 7a-10a).

The court of appeals unanimously affirmed the district court's dismissal of petitioner's complaint for lack of jurisdiction but held that the district court erred in refusing to enforce the Board's certification (Pet. App. 5a).

ARGUMENT

1. It is settled that determinations of the National Mediation Board in representation proceedings conducted pursuant to section 2, Ninth, of the Railway Labor Act, 45 U.S.C. 152, Ninth, are not subject to judicial review unless (1) the Board has failed to exercise a duty imposed upon it under the Act, or (2) the Board has acted outside of its "jurisdiction," in "excess of its delegated powers and contrary to a specific prohibition in the Act." In *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, a certification issued by the National Mediation Board was challenged on the ground that the Board had misconstrued the Railway Labor Act by defining the craft or class in which the election was conducted on

a system-wide rather than a divisional basis. This Court expressly refused to discuss the question of statutory construction, holding that "the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate." *Id.*, at 300. After examining the statute and its history, the Court observed that Congress did not "place on the federal courts the burden of having the final say on any aspect of the [representation] problem." *Id.*, at 303. "The [Congressional] intent," the Court held, "seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Id.*, at 305.[3] And, more recently, in *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, involving a challenge to the form of ballot utilized by the Mediation Board, the Court reaffirmed the principle of finality of Board proceedings under section 2, Ninth, of the Act (*id.*, at 658-659). This Court went on to indicate that the only circumstances where a court is authorized to strike down certifications of the Mediation Board are where the Board has acted " 'in excess of its delegated powers and contrary to a *specific prohibition in the Act*' " (*id.*, at 659-660)[4] or where the Board has failed to perform its statutory duty to "investigate" the dispute (*id.*, at 661-662).

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[3] See also, *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 336, and *General Committee* v. *Sou. Pac. Co.*, 320 U.S. 338.

[4] Quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188.

In the instant case, the court of appeals correctly ruled that neither of these circumstances was present (Pet. App. 3a-4a). The Board performed its statutory duty to investigate the dispute; it determined the appropriate craft, held an election in that craft, made findings regarding the result of that election, and certified the Teamsters as the bargaining representative. The principle that a court may require the Board to perform a statutory duty cannot, consistent with the *Switchmen's Union* and *Railway Clerks* cases, be converted into a license to review the manner in which the Board did perform its duty.

Nor was the Board's determination "in excess of its delegated powers and contrary to a specific prohibition in the Act." Petitioner argues (Pet. 9) that the Board's certification violates the provision of section 2, Fourth, of the Act, that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative" of the craft or class. However, as this Court stated in *Railway Clerks*, "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." 380 U.S. at 662. There is nothing in the legislative history of this provision to support petitioner's contention that Congress intended that an absolute majority of the employees must affirmatively indicate their support for a particular union before the Board could certify that union as the bargaining representative.[8]

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[8] The legislative history of the 1934 Amendments to the Act supports the view that such an indication of majority

The election procedures which have been utilized by the Board since its inception in 1934 represent a reasonable accommodation of the "majority rule" principle embodied in section 2, Fourth, of the Act, to situations where no single choice commands the support of the majority of the craft. The right of the majority to reject collective bargaining representation is preserved, for if fifty per cent or more of the craft fail to vote, no union is certified. On the other hand, where a majority of the employees cast valid ballots for various unions, the Board quite reasonably concludes that a majority favor collective bargaining representation;* and, if more than fifty

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support is not necessary. At the hearings Commissioner Eastman, the draftsman of the 1934 Amendments, was asked a number of questions concerning problems that might arise in connection with the conduct of elections. These included such questions as what the effect would be if a majority of employees failed to participate, and whether, for example, "[i]f only 40 percent of the total number of employees voted and 21 percent voted for a certain representation, that 21 percent then would speak the will of the 100 percent?" Commissioner Eastman's response to such questions was, in effect, that the proposed amendments did not provide the answers and that these were matters which the Board was to determine in connection with prescribing the procedures for the conduct of elections. See, Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., pp. 34-35. Petitioner's citation to page 57 of these Hearings (Pet. 9, fn. **) is misleading. Commissioner Eastman's testimony there does not relate to the point at issue here, but to the separate question of splitting crafts.

* The National Labor Relations Board at one time held the view that "where in an original election the combined vote for two labor organizations constitutes a majority of the votes cast, the employees have expressed a desire to bargain col-

per cent of those voting vote for one particular representative, that representative is certified. This is not inconsistent with the majority rule principle, for the certified union represents the choice of an absolute majority of those employees favoring representation.[7] While other procedures involving a different set of presumptions or inferences might be employed,[8] the Board's procedures, with the inferences the Board draws, are not arbitrary or unreasonable. As this Court concluded in *Railway Clerks* with respect to the type of ballot employed by the Board (380 U.S. at 671):

> The very nature of the arguments indicates that the Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board. These are matters for Congress and the Board rather than the courts. Here the Board—a creature of Congress

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lectively through some representative." *National Labor Relations Board* v. *Standard Lime & Stone Co.*, 149 F. 2d 435, 439 (C.A. 4), certiorari denied, 326 U.S. 723, citing National Labor Relations Board Fifth Annual Report, p. 60. The fact that the National Labor Relations Board has changed its procedure does not warrant the conclusion that the prior practice was arbitrary or unreasonable.

[7] If no one representative gets more than fifty per cent of the votes favoring collective bargaining representation, a run-off election is held. See, 29 C.F.R. 1206.1(a).

[8] See, *e.g.*, *Virginian Ry.* v. *Federation*, 300 U.S. 515, 560; *Railway Clerks* v. *Employees Assn.*, *supra*, 380 U.S. at 670; *National Labor Relations Board* v. *Standard Lime & Stone Co.*, *supra*, 149 F. 2d 435.

> —has been, as we have said, careful to provide fair, yet effective procedures and we feel certain that it will continue to do so. If its decision on the ballot is not acceptable, the place to go is to Congress, not to us.[9]

2. There is no merit to petitioner's contention that, even if the Board's certification of the employees' representative is not subject to challenge in the district court, the court may nevertheless refuse to enforce the employer's duty to bargain with that representative if it considers the certification to have been improper. Section 2, Ninth, of the Act, after setting forth the Board's duty to resolve representation questions and to certify the name of the representative to the carrier, provides:

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[9] The Board's practice at issue in the instant case was specifically challenged in *Railway Clerks* (Brief for Petitioner United Air Lines, Inc., in the Supreme Court, No. 139, October Term, 1964, pp. 51-54). The question was briefed by us although we also pointed out that no election had yet occurred (Reply Brief for the National Mediation Board and its Members, in the Supreme Court, Nos. 138, 139, 369, October Term, 1964, pp. 3-6). It may well be that in rejecting the challenge to the Board's procedures in *Railway Clerks*, the Court intended to dispose of the question at issue here, for it stated (380 U.S. at 670):

> The Board's rule of election procedure is that no vote is a vote for no representation, and this is now made plain to the voting employees. It is, as we have said, an assumption more favorable to the employees that the Association represents. Thus, under the Board's practice a majority of the craft or class, as required by § 2, Fourth, does have the right to determine who shall be the representative of the group or, indeed, whether they shall have any representation at all.

> Upon receipt of such certification the carrier *shall treat with the representative so certified* as the representative of the craft or class for the purposes of this chapter. [Emphasis supplied.]

Thus, the carrier's duty is not to bargain with the representative which it or a court might believe to be the true representative of the employees. Rather, the carrier is under a mandatory duty to "treat with the representative so certified." In a situation where the certification cannot be invalidated under the standards of the *Switchmen's Union* and *Railway Clerks* decisions, the carrier *must* bargain with the certified union under the clear language of the statute. The Act leaves no room for a court of equity to exercise discretion and excuse a carrier from refusing to bargain on the ground that the certification was improper under circumstances where the certification itself is immune from judicial invalidation.

Any other ruling would frustrate one of the principal purposes of the Act—to have representation disputes settled promptly so as to prevent any interruption to commerce.[10] The refusal of a court to en-

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[10] See, *Switchmen's Union* v. *Board*, *supra*, 320 U.S. at 302-303, where the Court referred to Commissioner Eastman's view that "it was very important 'to provide a neutral tribunal which can make the decision and get the matter settled.' " See, also, *Railway Clerks* v. *Employees Assn.*, *supra*, referring to the "major objective of the Railway Labor Act" as being " 'the avoidance of industrial strife, by conference between the authorized representatives of employer and employee' " (380 U.S. at 658) and to "the speed [in resolving representation disputes] which the Act's framers thought an objective of the first order" (380 U.S. at 668).

force the Board's certification will lead to a stalemate. The representation dispute, although in theory finally resolved by the Board, will actually continue because of the carrier's refusal to bargain with the certified representative. The Board will have no further authority, as it will already have certified the bargaining representative in the manner it believed to be proper, with the court having refused to invalidate that certification. Industrial strife, with an interruption in the nation's transportation industry, may well result from the continuing controversy among the carrier and its employees over the proper representative.

Moreover, the reasons underlying the Court's decisions in *Switchmen's Union* and *Railway Clerks* are just as applicable where the carrier challenges the Board's certification in an enforcement proceeding as where the certification is attacked in a suit against the Board to set aside the administrative action. Those decisions do not turn on the form of action;[11] they are based, rather, on the conclusion that Congress did not intend that courts should become involved in questions over how representation disputes should be resolved.[12]

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[11] Compare *American Federation of Labor* v. *Labor Board*, 308 U.S. 401, 406-411, and *Leedom* v. *Kyne*, *supra*, 358 U.S. at 187, involving the National Labor Relations Act.

[12] That it is the subject matter of the controversy and not the particular form of the litigation that limits the court's authority to become involved in the merits of representation disputes under the Railway Labor Act, is confirmed by the cases where the principles of *Switchmen's Union* were applied

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.[13]

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even though the suits were not brought against the Board to invalidate administrative action. See, *e.g.*, *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323; *General Committee* v. *Sou. Pac. Co.*, 320 U.S. 338; *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745 (C.A. 2), certiorari denied, 373 U.S. 924. See, also, *Rose* v. *Brotherhood of Railway & Steamship Clerks*, 181 F. 2d 944 (C.A. 4), certiorari denied, 340 U.S. 851, where the court applied the principles of Switchmen's Union in a suit to enforce a certification.

[13] If the petition for a writ of certiorari were to be granted, we would argue, additionally, that since petitioner has no standing to participate in a representation proceeding before the Board (*Railway Clerks* v. *Employees Assn.*, *supra*, 380 U.S. at 666-667), it has no standing to bring an action to review the Board's certification.

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